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# In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

TAMIMENT, INC.

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. A1–A13) is reported at 451 F. 2d 794. The Board's decision and order (App. C, *infra*, pp. A16–A35) are reported at 180 NLRB 1074.

## JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. A14–A15) was entered on February 22, 1972. The Board's timely petition for rehearing *en banc* was denied on June 5, 1972 (App. B, *infra*, p. A15). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether the Board may properly conclude that the employees of a summer resort camp, most of whom live and spend nearly all their time on the camp property, to which access is refused by the employer, are "beyond the reach of reasonable union efforts to communicate with them," so that "the employer must allow the union to approach his employees on his property" (*National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 113).

### STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *.
>
> Sec. 8(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 * * *.

### STATEMENT

#### A. THE BOARD'S FINDINGS OF FACT

Tamiment (the Company) is an adult summer camp located in the Pocono Mountains about 5 miles from

Bushkill and 13 miles from East Stroudsburg, Pennsylvania. The camp operates from May to the end of September. It is situated on 2,200 acres of land and is entirely surrounded by a fence. The only access is via a private road owned by the Company; the road is four city blocks in length, extending from the public highway to a gatehouse manned by guards. Outside the gatehouse, on the Company's property, is a lot where employees park their cars. (App. C, p. A19; App. A, p. A2.)

The number of Company employees ranges from about 300 in May and September to about 437 at the height of the season in July.[1] Some 80 to 85 percent of the Company's employees live on the premises in housing provided by the Company. The Company also furnishes three meals a day to its resident employees. The employees, who have no telephones in their rooms, work a variety of hours, shifts, and days in order to provide service for the guests on a twenty-four hour, seven days-a-week basis. (App. C, pp. A21, A26–A27.)

The camp is a self-contained community with its own post office, infirmary, laundry, beauty shop, and recreational and entertainment facilities. The employees are permitted to use these facilities, and there is no rule against socializing with guests. On the infrequent occasions when the employees leave the

[1] During the winter months a crew of three employees looks after the premises. About 25 to 30 percent of the Company's employees return to work at the camp each year. The remainder, many of whom are college students, are recruited every winter through newspaper advertisements, contacts with colleges, and other means (App. C, pp. A20–A21).

camp, they go to a racetrack or resorts in the Catskills, a movie theater in East Stroudsburg, or a nearby bar called the Log Cabin. Only half of the employees have cars. (App. C, pp. A26–A27; C.A. App. 26.)[2]

On May 12, 1969, Serge Schuster, a Union[3] organizer assigned to the Pocono Mountain resort area, came to the Tamiment gatehouse, but was told by the guards that he would not be allowed beyond the gate. The next day Schuster placed literature on the cars on the parking lot outside the gatehouse and spoke to four employees, each of whom signed a union authorization card. A few days later, when Schuster returned to the gatehouse area, the Company's administrative manager, Menell, told him that he could not solicit on the Company's property and would have to leave. (App. C, pp. A24–A25; C.A. App. 17–18, 20–21.)

On May 15, Union International organizer Harvey Morse wrote a letter to the Company's managing director, Gerard, in New York City informing him of the Union organizing campaign among the Tamiment employees and asking for "permission for access to your property so that we might contact your employees on their off time." The letter added that "[w]e have no intent to distract your employees during working periods * * *." There was no reply to the letter. (App. C, p. A25; C.A. App. 55.)

The following week Schuster handed authorization cards to three employees at the gatehouse area, but

[2] "C.A. App." refers to the Appendix in the court below, a copy of which we are lodging with the Clerk of this Court.

[3] Hotel and Restaurant Employees Union Local 558.

the guard prevented them from signing. Schuster returned the next day but did not see any employees. He later found three employees at the Log Cabin bar, obtained their signatures on cards, and gave them additional cards to distribute to other employees. On May 22, the guards informed Schuster that he would not be permitted even on the private road leading to the gatehouse. On May 28, Schuster and Morse went to the gatehouse together and were denied access to the camp. (App. C, pp. A25–A26.)

For the remainder of the 1969 season Schuster attempted about twice a week to meet Tamiment employees at the Log Cabin, at another tavern in Bushkill, and at Unity House, a nearby resort at which the Company housed some guests. In the course of the summer, he succeeded in reaching only about 25 employees. He handed out some 150 authorization cards and received back a total of 12 signed cards. (App. C, pp. A20, A26.)

### B. THE BOARD'S DECISION AND ORDER

The Board found that the "employees live, work and spend virtually all their time on [the Company's] premises" and that, therefore, without "access to [the Company's] premises, there is no place where the Union can communicate with [the Company's] employees except on a catch-as-catch-can basis * * *" (App. C, p. A30). The Board further found that the "Union * * * [made] reasonable efforts through ordinary normal channels to reach the employee[s] they were trying to organize but under the circumstances that prevailed at Tamiment such efforts were doomed to

failure" (App. C, p. A27). Accordingly, it concluded that the situation here fell within the principle recognized by this Court in *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 113: "if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property" (App. C, p. A29). The Board therefore held that the Company's refusal to grant the Union's requests for access to its property violated Section 8(a)(1) of the Act, and it ordered the Company to cease enforcing any rule or policy that denies access to its premises to nonemployee union organizers (App. C, pp. A31–A32).

### C. THE COURT OF APPEALS' DECISION

The court of appeals, over the dissent of Judge Biggs, declined to enforce the Board's order. The court concluded that the Union here had not made "sufficient reasonable attempts to satisfy [the *Babcock*] test" (App. A, p. A7). In reaching this conclusion, the court stated that the Union "made no effort to obtain a list of all the employees of Tamiment so that the union could send mail directly to them"; it "did not request the right to post notices of any sort at various staff facilities on company property or on the employees' parking lot"; and it "failed to arrange for any meetings for employees" (App. A, pp. A9–A10).

REASONS FOR GRANTING THE WRIT

The holding of the court of appeals rests on an erroneous interpretation of this Court's decision in *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105; it is in conflict with the decision of the Second Circuit in *National Labor Relations Board* v. *S & H Grossinger's, Inc.*, 372 F. 2d 26; and it raises an important issue in the administration of the Act. Review by this Court is thus warranted.

1. In *Babcock*, the Court held that "an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message * * *" (351 U.S. at 112). The Court recognized, however, that "if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property" (*id.* at 113).

This rule is designed to preserve the fundamental right of self-organization, which "depends in some measure on the ability of employees to learn the advantages of self-organization from others" (*ibid.*). In the usual case employees live off the employer's premises and union organizers are able to contact the employees personally "through the usual channels"—*i.e.*, "on streets or at home," or by "telephones, letters, or advertised meetings" (*id.* at 111, 112). But where,

as here, the employees live and spend most of their time on the employer's premises, access to those premises is restricted, and the employees do not even have telephones, the "usual channels" do not provide adequate personal contact with the employees, and the employer's "right to exclude from his property" must accordingly yield (*id.* at 112).

The court below, however, held in effect that before the Board, in applying the *Babcock* rule, can conclude that the "usual channels" of off-premises communication are inadequate, the union must show that every alternative either was tried and failed or clearly would have been unsatisfactory. Here, in the court's view, because the union had failed to seek a mailing list, had not attempted to post notices on Company property, and had not arranged for meetings with employees, the Board was not justified in ordering the Company to afford the Union access to the camp property.

As the dissenting judge correctly concluded, to impose this added requirement of strict exhaustion "puts too narrow an interpretation" on *Babcock* (App. A, p. A 12). The effect of the court's holding would be to prolong and complicate organizational campaigns by requiring a union to exhaust every conceivable technique—even probably pointless ones—lest a court later hold that some untried approach might have been fruitful. This Court in *Babcock* did not erect such a test; instead, it spoke of the union's obligation to make "reasonable attempts" at using means of communication that are "readily available" (351 U.S. at 112, 114) before a right to enter the employer's

premises arises. The standard set by the court of appeals is erroneously high.

Following the proper standard, the Board was entitled to conclude that the reasonable alternatives to on-premises solicitation were either unsuccessful or unavailable. The Company here had excluded the Union organizer even from the private road and parking lot outside the gatehouse and had failed to respond to a letter requesting access for the purpose of speaking with off-duty employees. There was nothing in the record to establish that a request for a mailing list or for permission to post notices would have been entertained more sympathetically by the Company. The Board could conclude also that mailed material and posted signs did not constitute in any practical sense "available channels of communication" enabling the Union "to reach the employees with its message" (351 U.S. at 112).[4] And, even if mail and notices were read by the employees, their irregular hours and overlapping shifts would have curtailed attendance at any meeting arranged by the Union.

By holding that the Union was nevertheless required to demonstrate attempts to use these alterna-

[4] Indeed, the court below recognized the likely futility of such efforts, acknowledging that "mail is no substitute for face to face contact" and that "notices may be of only marginal utility in stimulating interest in the union" (App. A, pp. A9, A10). Cf. *National Labor Relations Board* v. *United Aircraft Corp.*, 324 F. 2d 128, 130 (C.A. 2), certiorari denied, 376 U.S. 951: "Mailed material would be typically lost in the daily flood of printed matter which passes with little impact from mailbox to wastebasket."

tives, the Court interpreted and applied *Babcock* in a way which is in conflict with that decision.

2. The decision of the court of appeals is in conflict also with the decision of the Second Circuit in *National Labor Relations Board* v. *S & H Grossinger's, Inc.*, 372 F. 2d 26, 29–30, enforcing in relevant part, 156 N.L.R.B. 233. There some 60 percent of the employees of a Catskill resort lived and worked on the premises in circumstances much like those here. Attempts to reach the employees as they left by the main gate had been unsuccessful, and "[n]o effective alternatives [were] available to the Union in its organizational efforts" (372 F. 2d at 29).[5]

The court below sought to distinguish *Grossinger's* on the ground that the union there had requested and was denied a mailing list of employees and had engaged in "considerably greater" organizing efforts (App. A, pp. A10, A11). The Second Circuit's opinion, however, does not advert to the mailing list request, and does not rely on the extent of the union's efforts. Rather, the court there accepted the Board's view that the employees' living quarters and work location made efforts other than direct personal contact on the resort grounds inadequate. The company argued that the union had failed to try other off-premises techniques, to which the Board responded:

[5] The court, in language equally applicable here, noted that the "resident employees have no telephones in their rooms"; that "[r]adio and newspaper advertising are expensive and relatively ineffectual"; and that, "as far as radio is concerned, there was no single time at which a major proportion of employees would be off duty and free to listen to a message broadcast by the Union" (372 F. 2d at 29).

"The question is, however, not whether the union could have done more, but whether it reasonably did enough, under all of the circumstances of the case." 156 N.L.R.B. at 259. Thus, the standards of the Second and Third Circuits are different. Under the conflicting approaches of the two circuits, before a union can assert a right to access to the employer's premises in the Pennsylvania Poconos, it must exhaust every alternative, while a union in the New York Catskills need only make such attempts to communicate with employees off the premises as are reasonable in light of the geographic isolation of the hotel and the employees' living quarters.*

3. As the court below noted (App. A, p. A7, n. 2), "[t]his case is one of a growing number of cases involving unionization of self-contained resorts." See, *e.g., New Pines, Inc.,* 191 N.L.R.B. No. 144, 77 L.R.R.M 1543 (1971), application for enforcement pending, C.A. 2, No. 72–1025; *H & G Operating Corp., d/b/a Raleigh Hotel,* 191 N.L.R.B. No. 110, 77 L.R.R.M. 1758 (1971); cf. *Alaska Barite Co.,* 197 N.L.R.B. No. 170, 80 L.R.R.M. 1758 (1972). Just last

*The decision in *National Labor Relations Board* v. *Kutsher's Hotel and Country Club, Inc.*, 427 F. 2d 200 (C.A. 2), does not indicate that the Second Circuit has modified its holding in *Grossinger's*. In *Kutsher's*, the court rejected the Board's conclusion that access to a resort hotel was warranted, for it determined that there, unlike in *Grossinger's*, "the location of the [hotel] and the living quarters of the employees were such that there was no barrier to communication" (427 F. 2d at 201). Kutcher's property was intersected by a public road on which the union organizers could stand and personally speak with an estimated 95% of the employees crossing on their way to work (*id.* at 200–201).

Term, this Court held that its earlier ruling in *Babcock* continues to govern the right of union organizers to solicit on company property. See *Central Hardware Co.* v. *National Labor Relations Board*, No. 70-223, decided June 22, 1972.[1] The present case raises a substantial and recurrent question about the interpretation of *Babcock*, and it is important to the administration of the Act that the question be promptly resolved by this Court.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1972.

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[1] In *Central Hardware*, the Court held that the principles of *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, do not apply to solicitation by union organizers on the parking lot of a retail store. The case was remanded for further consideration under the *Babcock* standards.

# APPENDIX A

(Corrected Copy)

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 19,271

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TAMIMENT, INC., RESPONDENT

*ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD*

Argued June 24, 1971, before:
BIGGS and ROSENN, *Circuit Judges*, and
KRAFT, *District Judge*.

OPINION OF THE COURT

(Filed November 9, 1971)

ROSENN, *Circuit Judge*.

The National Labor Relations Board has applied to this court pursuant to Section 10(e) of the National Labor Relations Act (29 U.S.C. § 161(e)) for enforce-

ment of its order issued against respondent Tamiment, Inc., for violating Section 8(a)(1) of the National Labor Relations Act (29 U.S.C. § 158(a)(1)[1] by refusing to allow access to its premises for union representatives attempting to organize its workers. The opinion of the Board is reported at 180 NLRB No. 171.

The sole issue raised is whether the union has made an adequate showing that there are no reasonable alternative means for generating face to face contact with workers without having access to the employer's property. In view of the nature of the issue, the operations of Tamiment's resort should be described.

Tamiment, Inc., is an adult summer camp operated from approximately the beginning of May to the end of September each year in the Pocono Mountains of Eastern Pennsylvania. It is about four and a half miles from Bushkill, Pennsylvania, and thirteen miles from the larger town of East Stroudsburg, Pennsylvania.

The resort is a largely self-contained entity. Its 2200 acres, 475 of which are developed, are totally enclosed by a barbed wire fence. The main entrance to the hotel is a private road, approximately "four city blocks long," leading from the highway to the entry gate. A guardhouse stands at the gate and controls all entry to the property. There is an employee parking lot just outside the entrance gate with a capacity for 200 cars. Although no general solicitation is permitted on the property, members of the public are permitted to enter to look around on one hour

[1] 29 U.S.C. § 158(a)(1) provides:

"(a) It shall be an unfair labor practice for an employer

1. to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;"

passes. Once inside the gate a guest can move freely around the property.

The resort has almost all the living and recreational facilities that its guests and the 85% of the staff who live on the premises need. Besides a dining room, there are lakes, swimming pools, golf, nightclubs and other activities. There is also a United States Post Office on the premises that will send and receive mail for guests and staff.

The staff live in cottages spread throughout the grounds. They are given all their meals free which they take in their commissary, or in the main dining room before the guests eat. They have available a laundromat, and they can use all the recreational facilities of the hotel except in peak vacation periods and on weekends. There are no private telephones in the staff cottages, although there are public telephones at various locations. Those members of the staff who wish can bring food in to cook on hotplates in their rooms. Staff who live off the premises are given the meals served during their work hours without charge.

On their free time, employees frequent the Log Cabin, a bar and grill about one mile down the road from Tamiment, and other bars and restaurants in the area. They also go to the racetrack nearby and to other resorts in the Poconos. The nearest cinema is in East Stroudsburg, twelve to fourteen miles away. When the employees are on duty, most of them, with the exception of administrative and golf personnel, wear uniforms, but the management encourages them to wear regular clothes during their off-duty hours.

The staff is transitory. During the season the number of employees varies from about 300 in the slow spring and fall periods to a peak of about 435 during the summer. They are recruited from Florida, New

York, New Jersey, and Pennsylvania. Job advertisements are sent to state and federal employment agencies and to many colleges. A large number of the work force are students employed during their summer vacations. Many workers stay only a few weeks, and most do not last the entire five month season. Although the management writes each winter to the past season's employees to ascertain if they wish to return to Tamiment for the upcoming season, only about 25% to 30% of the staff do so.

The employees work a variety of shifts. Some departments of the resort such as reservations and maintenance, are on a twenty-four hour basis; others operate for eight to sixteen hours a day. Most people are on a six day week, although some waiters and waitresses are expected to work seven days weekly. An eight hour day is standard, but the dining room and beverage people have periods on and off duty throughout the day coinciding with meal hours and the operation of the nightclub. The housekeeping staff is also employed on a staggered work day basis.

During the spring of 1969, Local 558 of the Hotel and Restaurant Employees Union began an organizing campaign throughout resorts in the Pocono Mountains. Harvey Morse, the international trustee in charge of the local (Local 558 is in trusteeship) and its local organizer, Serge Schuster, had responsibililty for winning representation of the employees at Tamiment.

On or about April 1, 1969, Morse and Schuster went to Tamiment and talked with Victor H. Gerard, the Managing Director of the resort, and an associate, Alex Blaker. Morse suggested that because of a fire which had damaged Unity House, a nearby hotel owned by the International Ladies Garment Workers Union, it would be helpful for Tamiment's business if it were unionized. Gerard rejected the offer.

On May 12, the day before the season began in 1969, Schuster appeared at the gate to Tamiment, but was denied admission by the guard unless he had a permit from the management. He departed without meeting anyone and returned the next day, stationing himself near the employees' parking lot. He talked with four members of the staff. They signed authorization cards and at their request were given additional cards for other employees to sign. Schuster arranged to meet with them in a week. During the same visit Schuster also put union literature on various cars in the parking lot without interference by the guards.

Schuster again returned a day or two later and talked with Allen Menell, Administrative Manager of the hotel, who told him that if he wanted access to the employees he would have to have the permission of the management of Tamiment in New York. On May 15, the union sent such a letter, but it was never answered. On the following day, Schuster attempted to hand out leaflets just outside the gate, but Menell asked him to leave because traffic was heavy that Friday afternoon and he was causing congestion.

A few days later Schuster again returned. He did not find the four employees to whom he had previously talked, but he attempted to sign up three other workers just outside the guardhouse area. The guards interfered and refused to allow solicitation there.

On May 22nd, Schuster returned to Tamiment but was told by the guards that he could not come up to the guardhouse nor could he use the private road from the highway. Schuster noted that now there were "no trespassing" signs posted along the road. On May 28th, Morse and Schuster met with Gerard, the Managing Director, to ask for permission to enter the grounds. Their request was rejected.

Thereafter, Schuster began going to the Log Cabin, a nearby bar and grill, and to another tavern in Buskill, for the purpose of meeting employees. He continued to visit these places approximately twice a week until Tamiment closed at the end of September.

Mr. Schuster's final attempt to enter the property was a visit in mid-June as a guest during a meeting of two Philadelphia Cap and Millinery Union locals. Shortly after Schuster's arrival, Gerard and Menell received reports that he was talking to employees who were on duty and passing out literature. They sought him out and asked him to act like a guest or leave the premises. Schuster claims that he was then followed closely by security personnel and began to feel extremely uncomfortable even though he was not talking to employees. About two hours after the conversation, he decided to leave and checked out.

In sum, Schuster could claim that after a summer's effort he had spoken to about 25 employees and handed out about 150 authorization cards. He had secured only 12 signed cards.

On this record, the trial examiner found that management had violated Section 8(a)(1) of the National Labor Relations Act by excluding non-employee organizers from the premises when there were no effective off-premises channels of communication available to the union. He noted that the resort is a completely self-contained community, whose employees rarely need to leave. The staggered shifts and the lack of telephones make communication difficult. In his opinion, the union had made reasonable efforts to reach employees through the normal channels of communication, but such efforts were "doomed to failure." The only effective means was direct access to the premises. The Labor Board affirmed the trial examiner's findings.

If Tamiment's employees had undertaken this drive, there would be no question as to their right to campaign on its grounds. We are concerned with a different situation: the right of non-employee representatives of a union to have access to an employer's private property for the purpose of organizing his workers.[2]

The Supreme Court laid down the fundamental test for determining when non-employee organizers should be allowed to enter company property in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). It held that "when the inaccessibility of employees makes ineffective the *reasonable attempts* by non-employees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize." (Emphasis ours.)

Has the union in the case *sub judice* made sufficient reasonable attempts to satisfy that test? In cases involving self-contained resorts where the employees live on the premises, union organizers face a more difficult task in communication with the workers than they do in the ordinary plant situation, where employees leave daily and return to their homes. This problem is particularly acute in organizing where many believe that there is no substitute for some face to face contact between the union organizer and workers

[2] This case is one of a growing number of cases involving unionization of self-contained resorts (NLRB v. Kutsher's Hotel, 427 F.2d 200 (2nd Cir. 1970); NLRB v. S. & H Grossinger's, Inc., 372 F.2d 26 (2nd Cir. 1967); New Pines, Inc., 191 NLRB No. 144 (1971); H&G Operating Corp., 191 NLRB No. 110 (1971) in which the Labor Board has attempted to accommodate the employee's rights to organize under Section 7 of the National Labor Relations Act (29 U.S.C.A. § 157) with the employer's right to control his property.

during the campaign. *National Steel Corp. v. NLRB*, 415 F.2d 1231, (6th Cir. 1969). However, these needs and problems do not require that the employer forego his right to limit access to his property in a non-discriminatory fashion, absent a showing that the union could not take alternative measures to generate face to face contact.

Respondent has pointed out that the Labor Board has recently suggested that union organizers should endeavor to use newspapers, television and radio before being allowed to enter company property (*Folk Corp.*, 192 NLRB No. 100, p. 11, 77 LRRM 1916, 1920-1 (1971); *NLRB v. Kutsher's Hotel*, 427 F.2d 200, 201 (2nd Cir. 1970). We doubt that television and radio would have been an effective and reasonable alternative means of communication in this situation. In a hotel resort with employees working staggered shifts over a seven day work week, it is unlikely that a significant proportion of the work force would be able to listen to broadcast appeals at any one time. *NLRB v. S & H Grossinger's Inc.*, 372 F.2d 26, 29 (2nd Cir. 1967). On the other hand, as we discuss later, newspapers might have served a limited useful purpose.

The union must make reasonable efforts to communicate with workers through alternative means and arrangements when seeking face to face contact. The first and most obvious procedure for the union to follow would be to attempt diligently to reach workers when they are off company property. In this case Schuster tried to talk to workers outside the gate leading to Tamiment, and when told that such activities were not permitted because the guardhouse and employees' parking lot were on private property, he repaired to nearby taverns, hoping to meet employees there.

We cannot agree with the Labor Board that the failure of Schuster's efforts to bear fruit is sufficient to amount to an adequate basis for a finding that the union lacked reasonable channels of communication off-premises with Tamiment's employees.[3] While it may be difficult to describe generally what would amount to an effective effort to communicate with employees and generate face to face contact there are certain obvious and relatively inexpensive additional steps that Schuster and Morse should have attempted to undertake.

They made no effort to obtain a list of all the employees of Tamiment so that the union could send mail directly to them. Although mail is no substitute for face to face contact (*NLRB v. United Aircraft Corp.*, 324 F. 2d 128, 130 (2nd Cir. 1963), cert. denied 376 U.S. 951 (1964)) the Board has found letter writing a useful first step in communicating with employees. (*Falk Corp.*, supra). While management need not provide such a list in advance of a Labor Board sponsored election (*Excelsior Underwear, Inc.*, 156

[3] We have examined the entire record pursuant to the mandate in Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951) where the Court taught that: "Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.

NLRB 1236 (1966)), it is free to do so if it wishes, and it may be particularly willing to yield to this request to retain the atmosphere of quiet and serenity at its resort hotel.[4] Counsel for management at oral argument noted that Tamiment would have given the union such a list, that a United States post office facility was located on the property, and that the employer would not have interfered with any mail addressed to its employees by the union. This concession distinguished in part this case from *S & H Grossinger's Inc.*, supra, where the Second Circuit enforced the Board's order to admit union organizers after a request for a list had been turned down.

The union did not request the right to post notices of any sort at various staff facilities on company property or on the employees' parking lot. While such notices may be of only marginal utility in stimulating interest in the union, the failure to make such a request does reflect on the union's lack of initiative in devising techniques to meet with Tamiment's employees.

Finally, the union failed to arrange for any meetings for employees. It neither extended an invitation for such a meeting through using a mailing list or through the employees it had already signed up, nor made announcements in the local newspaper. It is reasonable to expect that any employees interested in organizing would be willing to make some effort to attend a meeting sponsored by the union during their leisure time. (E.g., *Falk Corp.*, supra, at 1920). Although the staggered shifts and seven day work weeks of some of the people at Tamiment might have limited the number of those in attendance, the union should have attempted to set up such meetings.

[4] We do not hold that an employer must provide a list of its employees to union organizers.

It is only after the union has made a showing that it used reasonable efforts to utilize "other available channels of communication" that the Board should proceed to consider the total effectiveness of these efforts and the countervailing inconvenience and injury to the employer having union organizers on his premises. Were the union to have made the necessary showing in this case, it seems clear that such additional questions would have been proper for the Board's consideration.

Neither of the previous cases decided by the Second Circuit dealing with entry by non-employee organizers to rural resorts is dispositive in this case. In S & H *Grossinger's,* supra, the Second Circuit upheld the Board's order for entry because the union engaged in considerably greater efforts at organizing than at Tamiment and was met by outright management hostility. (*S & H Grossinger's,* supra, at 29). In essence that decision was based on considerations of effectiveness we do not reach because of the union's failure to show a lack of any reasonable effort to utilize alternative channels of communication. Conversely, in *Kutsher's Hotel,* supra, where the union had direct face to face contact with the employees each day because ninety-five percent of them had to cross a public road to get from their living quarters to the hotel, the court found that the alternative means were adequate.

The record in this case shows nothing more than minimal efforts to communicate with respondent's employees. We are not satisfied that there is "substantial evidence on the record as a whole" to warrant an invasion of private property by non-employees for union organizational purposes.

The petition to enforce the order of the Board dated February 4, 1970 will be denied.

BIGGS, *Circuit Judge*, dissenting.

I conclude that the majority opinion puts too narrow an interpretation on *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956), which held that "where the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize." I believe that non-employee union organizers made reasonable attempts to communicate with the employees of Tamiment. Schuster's efforts to organize did not bear good fruit principally because he was not allowed to contact the employees to a reasonable degree.

It is conceded by the majority that mail is no substitute for face-to-face contact. *NLRB* v. *United Aircraft Corp.*, 324 F.2d 128, 130 (2nd Cir. 1963), *cert. denied* 376 U.S. 951, and it is also apparently conceded by the majority that communication by radio or television broadcasts could not be effective. It should be noted that the union sent a letter to the management of Tamiment in New York requesting permission to come upon the premises and that the letter was never answered. It should also be observed that Schuster attempted to hand out leaflets just outside the Tamiment gate but that the administrative manager of the hotel asked him to leave because traffic was heavy and he was causing "congestion." Congestion may well have occurred at or near the Tamiment gates but since the Tamiment enclave was surrounded with barbed wire and the union organizers were not permitted on the premises, where else could union organizational cards have been appropriately passed out to the employees. One could hardly believe that stopping cars along a public road at some point dis-

tant from the Tamiment gates to pass out union cards would be a permissible or even a legal method of attempting unionization. Also, Schuster was told by Tamiment guards that he could not come up to the guard house, could not use the private road from the highway, and new "No Trespassing" signs were posted along the road after attempts were made at unionization. Schuster also claims that he was followed closely by security personnel when he attempted to communicate with employees and that after a summer's effort he had spoken to about 25 employees, handed out about 150 authorization cards, but had secured only 12 signed cards. In fact, close to the end of the attempt to organize the record seems to support the conclusion that the union organizers were in effect prohibited from coming to the Tamiment grounds.

The case falls not only within *Wilcox, supra,* but also within the ruling of the Second Circuit Court of Appeals in *NLRB v. S & H Grossinger's, Inc.*, 372 F. 2d 26, 30 (2nd Cir. 1967), where the Board's order was enforced insofar as it required Grossinger's "to permit nonemployee union organizers to come upon its premises in order to solicit employees."

An examination of the whole record indicates to me that there existed a degree of hostility on the part of Tamiment to unionization, and a desire to resist unionization in ways not compatible with the National Labor Relations Act and the decisions of the Supreme Court.

For these reasons I must respectfully dissent. I would enforce the Board's order.

A True Copy:
Teste:
*Clerk of the United States Court of Appeals for the Third Circuit.*

# APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

(No. 19,271)

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

*v.*

TAMIMENT, INC., RESPONDENT.

JUDGMENT

Before: BIGGS and ROSENN, Circuit Judges, and KRAFT, District Judge.

This cause came on to be heard upon an application of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent, Tamiment, Inc., its officers, agents, successors, and assigns on February 4, 1970. The Court heard argument of respective counsel on June 24, 1971, and has considered the briefs and transcript of record filed in this cause. On November 9, 1971, the Court being fully advised in the premises handed down its decision denying enforcement of the Board's Order.

On consideration whereof, it is ordered and adjudged by the United States Court of Appeals for the Third Circuit that enforcement of the order of the National Labor Relations Board directed against Respondent, Tamiment, Inc., its officers, agents, successors, and assigns be and it hereby is denied.

It is further ordered that costs shall be taxed against Petitioner.

Judge Biggs dissents.

By the Court,

MAX ROSENN,
*Circuit Judge*

Dated: February 22, 1972.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

(No. 19,271)

NATIONAL LABOR RELATIONS BOARD

v.

TAMIMENT, INC.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, BIGGS, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, ROSEN and HUNTER, *Circuit Judges* and KRAFT, *District Judge*.

The petition for rehearing filed by the National Labor Relations Board, petitioner, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

MAX ROSENN,
*Judge.*

Dated June 5, 1972.

# APPENDIX C

## UNITED STATES OF AMERICA
## BEFORE THE NATIONAL LABOR RELATIONS BOARD

## (Case 4–CA–4940)

## TAMIMENT, INC. AND HOTEL AND RESTAURANT EMPLOYEES UNION LOCAL 558

## DECISION AND ORDER

On November 13, 1969, Trial Examiner Bernard J. Seff issued his Decision in the above entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist thereform and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Respondent filed timely exceptions to the Trial Examiner's Decision and a brief in support thereof.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Decision, the exceptions and briefs, and the entire record in this

case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Tamiment, Inc., Tamiment, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D.C.

FRANK W. MCCULLOCH, *Chairman,*
GERALD A. BROWN, *Member,*
HOWARD JENKINS, JR., *Member,*
NATIONAL LABOR RELATIONS BOARD.

(SEAL)

UNITED STATES OF AMERICA, BEFORE THE NATIONAL LABOR RELATIONS BOARD, DIVISION OF TRIAL EXAMINERS, WASHINGTON, D.C.

(Case No. 4–CA–4940)

TAMIMENT, INC., AND HOTEL AND RESTAURANT EMPLOYEES UNION LOCAL 558

*Robert D. Kaplan, Esq.,* of Philadelphia, Pa., for the General Counsel.

*David Kramer, Esq.* (*Lipkowitz, Plaut, Salberg & Harris*), of New York, N.Y., for the Respondent.

*Mr. Harvey Morse,* of Fountainville, Pa., for the Charging Party.

as Mr. Harvey Morse. Morse requested permission to enter upon the property which request was denied by Gerard.

The record indicates that Union organizer Schuster made about eight visits to Respondent's property between the time of his first visit which occurred in March until May 28. On the occasion of Schuster's eighth visit he first registered as a guest during a convention of Cap and Millinery Workers' Union and while on the premises talked to a number of employees and gave out literature in different areas on Tamiment property. When the Company representatives Gerard and Menell caught up with Schuster they complained to him that he was disrupting the employees during their regular working hours and that if that was what he continued to do he would have to leave. On the other hand if he was merely on the property as a guest of the hotel and he behaved like one that was all right with Respondent. Sometime between 5 and 5:30 p.m. on this day Schuster checked out and left Respondent's property. The record also indicates that during the course of Schuster's visits to Tamiment he distributed approximately 150 cards to a number of employees and asked them to have them signed and returned to him. Some of the meetings held with employees took place at a bar located in Bushkill called the Log Cabin and some of the cards were distributed to employees while Schuster was standing on the parking lot. Starting from May 13 Schuster spoke to about 25 employees and of these he obtained about 12 signed authorization cards.

The Company stressed that Tamiment is a seasonal operation. It has never operated for more than 6 months each year and the usual span of operation covers a period of 5 months. During the balance of the year there are no guests on the premises and no

more than a skelton crew comprising 3 employees. Tamiment's employee complement ranges from about 300 in mid-May up to about 430 to 437 in July and then down to just below 300 in September. During the past season Tamiment was open from May 3 to October 13. Approximately 80 to 85 percent of the staff resides on the premises. Staff housing is not centrally located, but is scattered throughout Tamiment's grounds. The remainder of the staff, who reside off the premises, live in the immediate area of Bushkill and East Stroudsburg, Pennsylvania. Tamiment provides lodging for all of those employees who reside on the premises and provides food, three meals a day, for most of those employees who do not reside on company property. Employees who eat on the premises normally take their meals in the main dining room or the staff cafeteria. Employees who reside off the grounds of Tamiment take only one meal a day at Respondent's facility. Tamiment employs various categories of workers at a variety of hours and days to provide service for its guests 24 hours a day, 7 days a week. Respondent maintains a general no-solicitation policy which results in the fact that only staff, guests and those people who sell to and service Tamiment directly are permitted to enter the premises. Recruiting help for each new season is accomplished by visiting resort areas in Florida in February, placing newspaper ads in Philadelphia, Newark, New Jersey and New York City newspapers throughout much of March and April, writing colleges, contacting unemployment services in the States of New York, New Jersey and Pennsylvania and contacting other resorts. Only 25 to 30 percent of Tamiment's former employees return on successive seasons. For the most part the returning employees are engaged in housekeeping, dining room and food

preparation and also in the commissary departments. Respondent experiences a serious problem, which is common to a seasonal resort industry, in that there is an abnormally high turnover among the employees. This fact is explained on the basis that many of Respondent's staff are made up of summer vacation employees. These summer vacation employees are people who are only available for part of Respondent's season and whose starting and terminating dates are at their own convenience rather than in response to Tamiment's requirements. Many summer vacation employees are college students earning money for school and, according to data offered in evidence during the course of the hearing, approximately 30 percent of Tamiment's employees this past season were summer vacation employees. The percentage of summer vacation employees in the various departments were explained as follows:

Front office—70 percent;
Reservations—30 percent;
Service—75–80 percent;
Dining room—30 percent;
Coffee shop—70 percent;
Beverage—40 percent;
Camp—100 percent;
Entertainment and Physical Recreation—50 percent and
Waterfront—85 percent.

Respondent explains that because of the high rate of turnover among summer vacation employees and the further fact that they are available only for short periods of Respondent's 5-month season the Company considers summer vacation employees as temporary help. The level of employment in each department is lowest in May and reaches its highest point in either July or August. Of the entire staff only 38.7 percent, or less that two-fifths, work more

than 8 weeks out of the 5-month season. It was also testified that 43.1 percent of the total staff worked less than 4 weeks out of the 5-month season.

The Respondent takes the position that this case is one of first impression because it involves a union request for access to the premises to a seasonal resort which operates for only 5 months of each year. The Company seeks to distinguish the two principle cases respecting access in the resort industry: *S & H Grossinger's Inc.*, 156 NLRB 233, enf'd as mod. 372 F. 2d 26 (C.A. 2) and *Kutsher's Hotel and Country Club, Inc.*, 175 NLRB No. 76, on the basis that the above cases involve year around 12-month operations. The other distinguishing factor which Respondent advances in his brief is that in addition to the year-around operation, in the *Grossinger* case there were other unfair labor practices consisting of an anti-union campaign and anti-union speeches. Respondent emphasises that the Union did not charge Tamiment with any other unfair labor practices and indeed none were committed. Furthermore, Respondent argues that the company in the *Grossinger* and *Kutsher* cases did not point to any prejudice or detriment which would accrue to the management if the union's requests were granted. The point is then made that the physical lay-out at Tamiment is unique and unusual conduct on the part of the Union on the premises would be a detriment to the proper functioning of Tamiment and it would interfere with the freedom of movement of its guest and staff. Respondent's brief summarizes the Company's position as being based on the following factors: (a) the effect of Tamiment's 5-month seasonal operation, (b) the availability to the Union of off premises channels of communication, (c) the failure of the Union to make any reasonable attempt to communicate with Tamiment's employees and (d)

the detriment to Tamiment because of the need to supervise the movements of the Union's representatives on Tamiment's grounds.

In the *Grossinger* case cited *supra*, from 54.6 to 65 percent of the company's employees, (i.e., 309 to 511 employees) live on the premises in housing supplied by respondent and receive their meals at the hotel. Thus the so-called unique physical setting of the camp location applies equally to both Respondent and *Grossinger*.

The Union made numerous unsuccessful attempts to communicate with Respondent's employees. Prior to the resort's opening and before any employees were on the premises, on or about March 31 or April 1, 1969, Harvey Morse, an international trustee for the Union and Serge Schuster, Union organizer, went to Respondent's resort and were approached by Respondent's Managing Director, Victor Gerard. Morse called to Gerard's attention the fact that there had been a fire at Unity House, an adjoining resort owned by the International Ladies' Garment Workers Union, and that Respondent might pick up some business that Unity House could not accommodate if Respondent operated a "Union House". Thereafter a Union representative again appeared at the resort on May 12 the day before it opened and "looked around outside of the gate". This Union representative, Schuster, saw no employees on this occasion but was told by guards in the guardhouse that he was not allowed past the entrance gate. He came back on May 13 and placed some literature on cars in the employees' parking lot. On that day Schuster spoke to four employees between the parking lot and the guard house asking them to join the Union. All four signed Union authorization cards. At their request Schuster gave each of these employees five or ten additional cards asked

them to sign up fellow workers and made arrangements to meet them within a week. On May 15 Morse wrote a letter to Gerard informing him that the Union was engaged in an organizing campaign among Respondent's employees. The letter, requesting permission for access to Respondent's property, said that the Union would contact the employees on their off time. The letter further stated that the Union had no intention of distracting Respondent's employees during working periods. Respondent never replied to this letter.

Schuster returned to the resort the following week to meet the employees he had seen on May 13. He waited near the entrance for 3 or 4 hours without seeing these employees but spoke to three other employees who were entering the gate and gave them authorization cards. The employees told Schuster they would sign the cards but the guard interfered by stating that he could not give them permission to do that at the place where the cards were given to them. Again on the following day Schuster waited for awhile, failed to see any employees and decided to go to the Log Cabin which is a restaurant located a few miles from Tamiment. At the Log Cabin he saw three other employees and convinced them to sign cards. These employees requested additional cards and made arrangements to meet Schuster in a few days to give him any cards they were able to get employees to sign. On May 22 Schuster went back to the guardhouse and the guards told him he was not to be permitted on Respondent's private road. Schuster left and never again returned to Respondent's premises for the purpose of communicating with Respondent's employees. Subsequently Morse and Schuster went to the resort to see Gerard, requested access to the premises, and were told that Tamiment would not permit the Union or-

ganizers on their property. Morse and Schuster then left. From early June until the resort closed at the end of September Schuster made visits to the area about 2 days a week in an attempt to communicate with the Respondent's employees. On these occasions he went to the Log Cabin, the tavern in Bushkill and to Unity House during periods when it was being utilized by Respondent to house guests.

Certain indicia common to the *Grossinger* and *Kutsher* cases establish that in these cases the following facts exist:

(a) 55.6 to 65 percent of *Grossinger's* employees lived on the premises;

(b) The employees spend almost all their time on the premises;

(c) The unions were unable to get in touch with the majority of the resident employees by reasonable attempts through usual channels;

(d) The employers failed to show that they would suffer substantial detriment in the operation of their business if they were required to abandon their "no access" rules.

In the case at bar between 86 percent and 92 percent of the employees reside on Respondent's premises. Respondent's employees who live on the premises are provided with all their meals and those living off premises receive meals while they are on duty. There is no restriction against employees socializing with guests and utilizing all of the many recreational and entertainment facilities except at times when such activity would interfere with their use by the guests. The resort is a complete self-contained community containing its own post office, infirmary and laundry facilities. Under these circumstances there is no need for an employee ever to leave the premises while he is employed by Respondent. There is very

little occasion for any employee to leave the premises because the nearest outside entertainment available to them, the Log Cabin Bar, is about a mile from the Respondent's road while the nearest movie theater is 12 to 14 miles away. In this connection it is to be noted that only approximately half of the employees have automobiles. To these facts there is added the further fact that employees not only rarely leave the resort but because of staggered work shift, irregularity of hours and the variation in work schedules they do not have much occasion or much opportunity to leave. Under all these circumstances it is clear that the Union is unable to reach the largest number of the employees off the premises at any one time. Further, adequate alternative means of communicating with the employees are also lacking. There are no telephones in the employees rooms and the record contains no information indicating that the employees could be reached by television or radio appeals or newspaper advertising. The Union did in fact make reasonable efforts through ordinary normal channels to reach the employee they were trying to organize but under the circumstances that prevailed at Tamiment such efforts were doomed to failure.

The Respondent in his brief urges that the granting of permission to Union representatives to come on its premises would work a serious detriment to Respondent. No facts were adduced to support this contention and in any case there is no reason to believe that the presence of Union representatives on Tamiment property would cause any greater problem for it than exists for the employers in *Grossinger's* and *Kutsher's*.

Respondent attempted to distinguish its operations from those of *Grossinger's* and *Kutsher's* because it is open only 5 months each year rather than 12 months. Further that that employee turnover is higher than

that of all year around resorts. The fact that the Respondent is engaged in a seasonal business, as distinguished from the situations that prevail in *Grossinger's* and *Kutsher's,* is a difference without a distinction. The Board has conducted representation elections among employees of seasonal employers for a great many years and the fact that certain individuals might not return in succeeding years does not in any way detract from the fact that all employees are entitled to Union representation if they so desire whether they are regular or seasonal employees. What is significant is that at times when Tamiment is in operation it requires the same categories of employees each year. And no effort was made on this record to attempt to establish that these categories of employees would not constitute an appropriate bargaining unit.

ANALYSIS AND CONCLUSIONS

In *N.L.R.B.* v. *Babcock and Wilcox Co.,* 351 U.S. 105, the Supreme Court held that in the preservation of his property rights, an employer may ordinarily bar nonemployee distribution and solicitation on his property. At the same time the court pointed out that organizational rights are likewise protected by law, and that when the circumstances are such that inaccessibility of employees makes ineffective the reasonable attempts of nonemployee organizers to communicate with employees through the usual channels the right of an employer to exclude them from his property must yield to the extent necessary to permit communication of information on the right to organize. The problem in each case, as the Supreme Court pointed out, is the accommodation of the two rights "with as little destruction of one as is consistent with

the maintenance of the other" (*id.* at 112), and added that "if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable efforts to communicate with them, the employer must allow the Union to approach his employees on his property." (*Id.* at 113.)

The principles enunciated in *Babcock and Wilcox,* as they apply to the resort hotel industry were considered in *S & H Grossinger's, Inc.,* where the applicable authorities are cited and discussed (156 NLRB at 254–264), which decision was to the extent here applicable, adopted *in toto* by the Board (156 NLRB 233), and enforced by the Cost of Appeals for the Second Circuit (372 F.2d 26, 29–30). No good purpose would be served by again reviewing and discussing those authorities. It is sufficient to say in that case the Board, with court approval, laid down the rule that absent legitimate business considerations, an employer who houses his employees on his premises, may not deny Union access to such premises for the purpose of discussing unionism with its employees, unless other *adequate* channels of communication with the employees are available to the Union. The issue, therefore boils down to the narrow question as to whether on the facts developed in this record there exists *adequate* opportunity for the Union to communicate with the employees in some manner other than requiring respondent to grant access to the Union to come on its property. For the reasons detailed below I find and conclude that under the facts in this case the limited opportunity which the Union had to contact employees did not afford the Union a reasonable opportunity to communicate with employees within the rule of *Babcock and Wilcox, supra.*

The basic premise inherent in the Supreme Court's holding in *Babcock and Wilcox, supra*, that the employer's right to keep nonemployee organizers off his property must yield to the right of his employees to engage in self-organization where the location of the plant and the living quarters of the employees place them "beyond the reach of reasonable Union efforts to communicate with them," is that the employees must have a reasonable opportunity to discuss the Union with the latter's representatives in a relaxed atmosphere so that they may reach a reasonable decision with respect to representation. Such rights are fully protected in the ordinary case of a typical industrial plant in an urban community, where the employees work regular shifts and reside off company premises so that the union representative may visit the employees at their homes to discuss matters at leisure. In the instant case employees live, work and spend virtually all their time on Respondent's premises. Absent access to Respondent's premises, there is no place where the Union can communicate with Respondent's employees except on a catch-as-catch-can basis or when a few of them repair to the Log Cabin a mile away from the Company's premises. Thus, within the language of the Supreme Court's holding in *Babcock and Wilcox, supra*, "if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable Union efforts to communicate with them, the employer must allow the Union to approach its employees on its property." (351 U.S. at 113.)

Respondent did not adduce evidence to show that a substantial detriment would accrue to it if it were required to abandon its "no access" rule or policy. While it is true that in the operation of its hotel facilities Respondent has every right to regulate the access of outside organizers by restricting them to specific

areas and limiting their number so as to maintain efficiency and discipline in their business operations and to preclude the possibility of disturbance or interference with its guests the Board said in *S & H Grossinger's, supra* 261, "Just as the right to enter does not mean the right of unlimited entry, neither does the right to regulate entry mean the right to prohibit it altogether."

For the foregoing reasons, I find and conclude that Respondent's refusal to grant the Union's requests for access to its property interfered with, restrained, and coerced the employees in the exercise of their rights protected by Section 7 of the Act, and therefore violated Section 8(a)(1) of the said Act.

Upon the foregoing findings of fact and the entire record in the case, I make the following:

## CONCLUSIONS OF LAW

1. Respondent is an Employer within the meaning of Section 2(2) of the Act, and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to permit representatives of the Union to come upon its premises to discuss the Union with employees under the circumstances above set forth, Respondent interfered with, restrained, and coerced its employees in the exercise of rights guaranteed them by Section 7 of the Act, and thereby engaged in and is engaging in unfair labor practices proscribed by Section 8(a)(1) of the Act.

4. The aforesaid labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent unlawfully denied representatives of the Union permission to come upon its premises to discuss the Union with Respondent's employees, it will be recommended that Respondent be required to grant such permission for the purposes stated, except that such access may be reasonably regulated by Respondent as herein indicated.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is recommended that the National Labor Relations Board enter an order against Tamiment, Inc., its officers, agents, successors and assigns, requiring it to

1. Cease and desist from:

(a) Continuing or giving effect to any policy or rule denying nonemployee organizers access to its employees residing on its premises for the purpose of soliciting them during their free time on behalf of the Union, or from consulting, advising, meeting, or assisting said employees in regard to their right to self-organization, except that access to its premises for said purposes may be reasonably regulated.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as authorized by Section 8(a)(3) of the National Labor Relations Act as amended.

2. Take the following affirmative action found necessary to effectuate the policies of the aforesaid Act:

(a) Post at its premises at Tamiment, Pennsylvania copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 4, after being duly signed by its authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify said Regional Director, in writing, within 20 days from the receipt of this Decision what steps it has taken to comply herewith.[4]

Dated at Washington, D.C.

BERNARD J. SEFF,
*Trial Examiner.*

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[3] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes. In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[4] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order what steps it has taken to comply herewith."

## APPENDIX

## NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATION BOARD AN AGENCY OF THE UNITED STATES GOVERN MENT

PURSUANT TO THE RECOMMENDED ORDER OF A TRIA EXAMINER OF THE NATIONAL LABOR RELATIONS BOAR AND IN ORDER TO EFFECTUATE THE POLICIES OF TH NATIONAL LABOR RELATIONS ACT, AS AMENDED, W HEREBY NOTIFY OUR EMPLOYEES THAT:

We will, subject to reasonable rules and regulation allow Union organizers not employed by us access t our premises for the purpose of soliciting our em ployees who reside on our premises, during their fre time, on behalf of a union, or consulting, advisin meeting, or assisting our employees during their fre time, in regard to their rights to self-organization, t form, join, or assist a labor organization to bargai collectively through representatives of their ow choosing, to engage in concerted activities for the pu poses of collective bargaining or other mutual aid o protection, except to the extent that such rights ma be affected by an agreement requiring membership i a labor organization, as authorized by Section 8(a)(3 of the National Labor Relations Act, as amended. Al rules and regulations to the contrary, heretofore issue or promulgated by us, have been revoked.

All our employees are free to become or remain or to refrain from becoming or remaining members of HOTEL AND RESTAURANT EMPLOYEES LOCAL 558 or any other labor organization.

TAMIMENT, INC.,
*Employer.*

Dated----------

By----------

(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, 1700 Bankers Securities Building, Walnut and Juniper Streets, Philadelphia, Pennsylvania, 19107 (Tel. No. 215–597–7601).

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IN THE

# Supreme Court of the United States

October Term, 1972

No. 72-371

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

v.

TAMIMENT, INC.,
*Respondent.*

On Petition for a Writ of Certiorari to The United States Court of Appeals for The Third Circuit

## RESPONDENT'S BRIEF IN OPPOSITION

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## RESPONDENT'S BRIEF IN OPPOSITION

### Question Presented*

Whether the United States Court of Appeals for the Third Circuit correctly concluded that the employer, a self-contained resort facility, may assert its property rights and deny non-employee union organizers access to its premises where there are reasonable alternate means for communicating with employees available to the union? *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

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* Respondent, being dissatisfied with Petitioner's Question Presented, presents the question pursuant to Rule 40.3 of this Court.

## Argument

### Reasons For Denying The Writ

1. The Decision Of The Court Of Appeals Conforms To The Applicable Decisions Of This Court.

The Court of Appeals for the Third Circuit held that under this Court's decision in *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956) Tamiment, Inc., the employer, was not required to grant access to its premises to non-employee union organizers because there were reasonable alternate means of communication available. The Board disputes this interpretation contending the Third Circuit in effect misapplied the *Babcock* rule by unreasonably requiring the union to exhaust all communication alternatives or show that they clearly would be unsatisfactory before the union is entitled to access to the employer's premises. (Pet., App. A, p. 8).

Contrary to the Board's position, the Third Circuit did not apply a test suggestive of any such strict standards. It carefully weighed the communication options available to the union and concluded that the union had not made reasonable efforts to utilize alternate channels to communicate with employees based upon the following facts:

a. The union made no effort to obtain a list of the employer's employees, which would have been forthcoming, so that it could write to them. (Pet., App. A, pp. A9-A10).

b. The union did not request permission to post notices to employees on the employer's premises, showing a "lack of initiative in devising techniques to meet with Tamiment's employees". (Pet., App. A, p. A10).

c. The union made no effort of any kind to arrange meetings off premises with employees. (Pet., App. A., p. A10).

In light of the union's failure to exercise even minimal efforts fundamental to any unionization drive, the Third Circuit properly determined under *Babcock* that there is no basis "to warrant an invasion of private property by non-employees for union organizational purposes". (Pet., App. A, p. A11). Under these circumstances the court of appeals correctly held that the union may not insist that the employer aid union organization. *Babcock*, 351 U.S. at 112.

The rule of this Court is that decisions of a court of appeals in a case involving the findings of an administrative agency should seldom be subject to review.

> "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

This Court's decision in *Central Hardware Co.* v. *NLRB*, No. 70-223, decided June 22, 1972, is to the same effect.

2. There Is No Conflict Between The Decisions Of The Third Circuit And The Second Circuit.

The decision in this case is not in conflict with the decision of the Second Circuit in *NLRB* v. *S & H Grossinger's Inc.*, 372 F.2d 26 (2d Cir. 1967). *Grossinger's* is clearly distinguishable from the instant case. There the employer not only turned down a union request for a list of employees, but also actively campaigned against the

union, unlawfully solicited employees to withdraw from the union and committed other substantial unfair labor practices designed to thwart the union's organization drive. None of these factors is present here. It should also be noted that the union's organization efforts in *Grossinger's* were much more extensive than those in the present case.

In a later case, also involving a self-contained resort, *NLRB* v. *Kutsher's Hotel and Country Club, Inc.*, 427 F.2d 200 (2d Cir. 1970), the Second Circuit distinguished *Grossinger's* and denied non-employee organizers access to the employer's premises. Although there was a public accessway in *Kutsher's*, the Second Circuit stressed that it could not characterize the scant union organizational efforts as meeting the reasonable union organziation efforts contemplated under *Babcock*. The concern of the Second Circuit over the union's minimal organization efforts in *Kutsher's* is instructive, particularly since the union's organization efforts there were substantially greater than those in the present case. From *Kutsher's* and the present case it is obvious that both courts believe that a union must make a reasonable showing of organization efforts before it will require an employer to grant access to its premises under the *Babcock* rule.

The Second Circuit, in further distinguishing *Kutsher's* from *Grossinger's*, pointed out that in *Grossinger's* there was union animus and unfair labor practices buttressing Respondent's position here that *Grossinger's* is different from the present case.

Under these circumstances, the Board is in error in maintaining that the two circuit courts applied different standards.

## CONCLUSION

**For the foregoing reasons, the petition for a writ of certiorari should be denied.**

Respectfully submitted,

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September 27, 1972.

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## RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

### Recently Decided Case

Subsequent to submission of Respondent's brief in this case, the Circuit Court of Appeals for the Second Circuit handed down an opinion in *NLRB* v. *New Pines,* 81 L.R.R.M. 2423 (2d Cir. Oct. 4, 1972). This is the third case it has decided in recent years involving, as does the *Tamiment* case, the question of the application of this Court's holding in *NLRB* v. *Babcock & Wilcox Co.,* 351 U.S. 105 (1956) regarding a demand for access to hotel premises by a union organizer.

In support of its holding in *New Pines*, the Second Circuit cited the Third Circuit decision in *Tamiment* concluding:

> "In short, on this record the union's organizing efforts were simply insufficient to require the hotel to grant access to the union's organizer. See NLRB v. Tamiment, Inc., 451 F. 2d 794 (3d Cir., 1971)."

Therefore, contrary to the contention of the National Labor Relations Board, the Second Circuit decision in *New Pines* further conclusively establishes that there is no conflict between the Second and Third Circuit regarding the standards applicable to this line of cases.

Respectfully submitted,

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October 25, 1972